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NO. 87-1613

IN THE

Supreme Court of The United States

OCTOBER TERM, 1987

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,
Appellant

v.

THE STATE OF NEW HAMPSHIRE,
Appellee

On Appeal From The Supreme Court
Of New Hampshire

MOTION OF APPELLEE, MICHAEL W. HOLMES, CONSUMER ADVOCATE, TO DISMISS OR AFFIRM

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May 13, 1988

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MOTION OF MICHAEL W. HOLMES, CONSUMER ADVOCATE, TO DISMISS APPEAL, OR, IN THE ALTERNATIVE, MOTION TO AFFIRM

Pursuant to Supreme Court Rule 16.1, Appellee, Michael W. Holmes, Consumer Advocate, (hereinafter, Office of the Consumer Advocate or OCA)[1], hereby moves that this Honorable Court dismiss the appeal of Public Service Company of New Hampshire, on the grounds that the appeal does not present a substantial federal question and that the federal issues were not timely or properly raised. In the alternative, the OCA moves that the Court affirm the decision of the Supreme Court of New Hampshire rendered below.

COUNTERSTATEMENT OF CASE

On or about January 1972, Public Service Company of New Hampshire (PSNH or Company) proposed to construct two 1150 megawatt (MW) nuclear reactors at Seabrook, New Hampshire. (Seabrook Unit I and Unit II). The estimated cost of each Unit was $486 million. Unit I's commercial operation date originally was November 1979, and Unit II was November 1981.[2] Seven years late and *billions* over original estimates, Seabrook Unit I was *completed* in October, 1986. Seabrook Unit II was allegedly cancelled in 1986.[3] The Company is unable to predict when or if Seabrook Unit I will enter

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[1] The OCA is an agency of the State of New Hampshire authorized to represent the interests of New Hampshire residential utility consumers before the New Hampshire Public Utilities Commission and any state or federal agency or court in which the interests of the residential utility consumers are involved. N.H. Rev. Ann. 363:28 (Supp. 1987). Appellee, Michael W. Holmes, has served as the Consumer Advocate of New Hampshire since 1983.

[2] *See Appeal of Conservation Law Foundation (CLF)*, 127 N.H. 606, 649, 507 A.2d 652, 682 (1986).

[3] Although PSNH publicly announced this Unit's cancellation, the construction permit has not yet been returned to the Nuclear Regulatory Commission.

commercial operation.[4] PSNH now assumes for financial planning purposes that Seabrook Unit I will enter commercial operation on January 1, 1990.[5] The total project cost is increasing by $50 million per month.[6]

PSNH sought protection from its creditors under the Bankruptcy Code on January 28, 1988. At the root of the company's problems is its ownership of a share of a nuclear generating facility, disproportionate in relation to its customer base[7], that is arguably located in the wrong place[8]. New Hampshire law prevents PSNH from collecting for Seabrook until it operates. N.H. Rev. Stat. Ann. 378:30-a (1984). Unlike other electric utilities, PSNH either steadfastly refused or was simply unable, until too late, to modify its original investment plans to reflect changing and current realities. Neither the New Hampshire Public Utilities Commission (PUC) or the consumers had any right to interfere with this utility's investment plans.

Determined to become northern New England's major power producer, the Company's management undertook a nuclear construction project of a size and magnitude usually reserved for electric utilities serving major metropolitan areas rather than rural New Hampshire. Original plans called for PSNH to own a 50% share of each Unit (1150 MW total entitlement), and be the "lead owner" of the project. The other

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[4] PSNH, SECURITIES AND EXCHANGE COMMISSION, FORM 10-K, ANNUAL REPORT (MARCH 27, 1987).

[5] PSNH, SECURITIES AND EXCHANGE COMMISSION, FORM 10-K, ANNUAL REPORT (MARCH 30, 1988).

[6] *See Petition of PSNH*, 130 N.H. _____, _____ A. 2d _____ (Jan. 26, 1988), slip opinion at 2, (*Jurisdictional Statement*, Appendix A).

[7] PSNH's investment in Seabrook is over three times that invested in its *entire* system. *See Jurisdictional Statement* at 23.

[8] *See Re: PSNH*, 14 N.R.C. 279 (1981), *aff'd, Seacoast Anti-Pollution League (SAPL) v. NRC*, 690 F.2d 1025 (D.C. Cir. 1982).

utilities (Joint Owners) owning shares of the plant are New England utilities and members of the New England Power Pool. (NEPOOL).[9]

PSNH had never undertaken to finance and construct a generating station of this size, indeed, it had never before attempted to be the "lead owner" of a nuclear generating facility or any other NEPOOL Joint Ownership Project. The company's largest investment prior to Seabrook was the 400 MW oil-fired generating station located at Newington, New Hampshire. Newington's five-year construction program was completed in 1971 at a total cost of $159 million.

At issue is whether PSNH's investors have been properly rewarded for the results of these miscalculations. More fundamental still, is whether capitalism has any meaning when investors actually encounter the harsher side of the risk/reward relationship. If it does, PSNH's investors have received all to which they are entitled.

New Hampshire has traditionally used the method of an Allowance For Funds Used During Construction (AFUDC) to provide a return to the utility during a plant's construction period.[10] By the late 1970's, PSNH was claiming it needed Construction Work In Progress (CWIP) in rates and could not support its 50% share in the Seabrook project without a

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[9] "NEPOOL has been described as 'a regional power-pooling system' with a membership of approximately sixty New England utilities which collectively contain roughly ninety-eight percent of New England's generation capacity. *See Appeal of New England Power,* 120 N.H. 866, 870, 424 A.2d 807, 810 (1980), *rev'd on other grounds sub nom., New England Power Co. v. The State of New Hampshire,* 455 U.S. 331 (1982). NEPOOL's objectives 'are to assure the reliability of the region's bulk power supply' and to attain 'maximum practicable economy' through, inter alia, 'joint planning central dispatching ... coordinated construction, operation and maintenance of electric generation and transmission facilities owned or controlled by the Participants ....'" *Appeal of CLF,* 127 N.H. at 632, 507 A.2d at 670, citing, *New England Power Co. v. New Hampshire,* 455 U.S. 331, 334 (1982).

[10] *See Appeal of Pub. Serv. Co. of N.H. (PSNH),* 125 N.H. 46, 50, 480 A.2d 20, 22 (1984).

change in ratemaking methods. This was probably accurate, although PSNH was able to complete Unit I at its current ownership percentage on or about October 1986. On May 28, 1978, some years after construction on the project had gotten underway, PSNH petitioned the PUC to include a portion of CWIP into the company's rate base so as to receive a current, rather than deferred (AFUDC) return, on plant under construction.

After the PUC authorized this historic inclusion of CWIP in rate base, the decision was upheld by the New Hampshire Supreme Court as within the PUC's discretion.[11] The Legislature, in response to public opposition to this change in traditional ratemaking methods, passed N.H. Rev. Stat. Ann. 378:30-a (1984), (the so called anti-CWIP statute). This statute codified the traditional ratemaking method of used and useful, and eliminated the PUC's discretion to award rates based on CWIP.

> "Throughout the life of the Seabrook project, with the exception of the limited period between PUC order No. 13,162 (May 25, 1978) which included CWIP in the company's rate base, see *LUCC v. Public Service Co. of N.H.*, 119 N.H. 332, 402 A.2d 626 (upholding order as a matter of policy), and the effective date of 30-a (May 7, 1979), CWIP has been excluded from the rate base. This is not a situation, for example, in which the anti-CWIP law was enacted on the eve of the loss itself so that enforcing it would preclude both a return commensurate with risk and a recoupment of the loss."[12]

The passage of the anti-CWIP Statute, reestablished the historic status quo, and the Company determined it could not

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[11] *See Re PSNH, 63 N.H.P.U.C. 127 (1978), aff'd, Legislative Utility Consumers' Counsel (LUCC) v. PSNH*, 119 N.H. 332, 402 A.2d 626 (1979).

[12] *Petition of PSNH*, slip opinion at 9.

support an ownership level greater than 28% in both plants.[13] Yet the Company failed to sell down to that level and still owns 35.6% of Seabrook.[14]

By 1981, questions were being raised at the Nuclear Regulatory Commission (NRC)[15] concerning the Seabrook site and possible problems in evacuating the population in such a high density area in the event of an emergency at the plant. The positions of those who maintain Seabrook cannot cope with emergencies was established long before the 1988 Presidential Campaign. PSNH does not seek recovery in rates from those whom it alleges caused its licensing problems, but from those who have cooperated in the Seabrook licensing process.

From the beginning, this project was a very significant undertaking for a company as small as PSNH. While it is the largest electric utility in New Hampshire, it serves less than 350,000 customers.[16] The level of financing required to complete this project is unprecedented in New Hampshire utility history. It is probably unprecedented nationally on the basis of cost per installed kilowatt of capacity.

By the spring of 1984, the Company was insolvent. Its commercial bankers had had enough of the "Brazil" of electric utilities and refused to extend further credit.[17] In response, rather than sell down their Seabrook interest to a size it could handle, the Company proposed a "Ponzi"scheme in which it issued almost $1 billion of "junk bonds" in a three-step financing plan

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[13] *See Appeal of LUCC*, 120 N.H. 173, 174, 412 A.2d 738, 739 (1980).

[14] Under buyback agreements with other utilities resulting from the sell down to 35.6%, PSNH is in reality still responsible for approximately 42.09% during the early years of Seabrook's operation. Not until after Seabrook has been in commercial operation for seven (7) years does PSNH's ownership percentage equal 35.6%.

[15] *See Re PSNH*, 14 N.R.C. 279 (1981), *aff'd*, *SAPL v. NRC*, 690 F.2d 1025 (D.C. Cir. 1982).

[16] PSNH, FERC FORM NO.1 : ANNUAL REPORT OF MAJOR ELECTRIC UTILITIES, LICENSEES AND OTHERS (1987).

[17] *See Jurisdictional Statement* at 5.

called "Newbrook". Step One involved, the issuance of $90 million worth of short term financing.[18] Step Two involved the sale of debentures and warrants, the object of which was to retire the $90 million indebtedness incurred as Step One, plus $335 million in new money ($425 million total).[19] This step sought authority to issue certain securities more than *four* times the size of any previous financing request.[20] Step Three involved the sale of $525 million worth of securities,[21] the largest financing in New Hampshire history.

Based upon the Company's representations, and in particular its *December, 1986* on-line date for Seabrook Unit I, the PUC and the New Hampshire Supreme Court allowed these financings, even though the yields on these securities were as high as 23%.[22]

> "If Seabrook's history has taught us anything, it is that the projections and estimates offered by PSNH officials and witnesses—and frequently relied upon by both the commission and the court—almost always prove to be wrong."[23]

The $70 million "emergency" rate increase requested by PSNH in the case at bar on August 1987, will not restore the Company's financial integrity, it would not have made it solvent, nor would it have allowed the Company to avoid bankruptcy. PSNH needs an increase of $366.6 million, or 77.4%

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[18] *See Appeal of Seacoast Anti-Pollution League (SAPL)*, 126 N.H. 789, 497 A.2d 847 (1985).

[19] *See Appeal of SAPL*, 125 N.H. 465, 482 A.2d 509 (1984); *Appeal of SAPL*, 125 N.H. 708, 490 A.2d 1329 (1984).

[20] *See Appeal of SAPL*, 125 N.H. 465, 466, 482 A.2d 509, 511 (1984).

[21] *See Appeal of Conservation Law Foundation (CLF)*, 127 N.H. 606, 507 A.2d 652 (1986).

[22] *Appeal of CLF*, 127 N.H. at 650, 507 A.2d at 682,(King, C.J. dissenting).

[23] *Appeal of CLF*, 127 N.H. at 649, 507 A.2d at 681, (King, C.J. dissenting).

more than presently allowed New Hampshire jurisdictional revenues simply to service its debt as it presently exists.[24]

PSNH has had since 1979 to challenge N.H. Rev. Stat. Ann. 378:30-a (1984). It did not appeal when the statute was first applied to it,[25] nor has it raised any of the issues presented in this matter in any appeal of a rate case or PUC decision since 1979.[26] The Court should also be aware that after the New Hampshire Supreme Court's decision in the *Appeal of Pub. Serv. Co. of N.H.*, 125 N.H. 46, 480 A.2d 20 (1984), in which the Court first interpreted N.H. Rev. Stat. Ann. 378:30-a (1984), the case was remanded to the PUC. Hearings were held and issues identical to those raised here were actually litigated and administrative remedies exhausted.[27] PSNH then failed to appeal the PUC's denial of a return *on* or *of* its investment in the abandoned Pilgrim II nuclear generating project.

On May 29, 1986, PSNH petitioned for a permanent rate increase of approximately $58.9 million.[28] In addition, the Company requested a $35 million "step increase" for attrition. By Report and Fourteenth Supplemental Order No. 18,726, 72 N.H.P.U.C. ____ (June 29, 1987), the PUC authorized an increase of approximately $20 million and no step increase.[29] It was during the pendency of this rate case that PSNH supposedly lost its "financial integrity." But it did not raise the constitutional issues presented here in that rate case. Indeed, it would have been difficult to argue that a statute is unconstitutional as applied, where in that very same case the Company

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[24] Affidavit of Robert J. Harrison, President PSNH, Exhibit No. 2, Tab 9, page 7, Appendix to Interlocutory Transfer.

[25] *See Re: PSNH*, 64 N.H.P.U.C. 295, 31 P.U.R. 4th 351 (1980).

[26] *Petition of PSNH*, slip opinion at 9.

[27] *Re: PSNH*, 71 N.H.P.U.C. 371 (1986); *Re: PSNH*, 71 N.H.P.U.C. 581 (1986).

[28] *See* N.H. Rev. Stat. Ann. 378:28 (1984).

[29] PSNH's final request to the PUC in that proceeding was for a $38.7 million increase.

actually included in rate base for the first time its prudent and used and useful investment in the Millstone III nuclear generating plant located in Waterford, CT. Millstone III was both *built* and *licensed* under the constraints of the anti-CWIP statute. So the Company decided to file an "emergency" rate case and avoid the facts which would be found by the PUC as to PSNH's overall financial condition in a real case in controversy.

The Company has appealed the June 1987 rate order to the New Hampshire Supreme Court, and the matter is currently awaiting Oral Argument.[30] In that appeal and in this one, PSNH has raised issues relating to the adequacy of the allowed return on equity arguing it was not properly rewarded for the risk to equity occasioned by the anti-CWIPstatute.

On August 5, 1987, while the period for appealing the PUC rate order to the State Supreme Court had not yet expired,[31] PSNH filed this end run around the rate case decision and requested an "emergency" rate increase for $70 million. In its application, PSNH proposed that the PUC allow it a special emergency rate base increment of $464.5 million (27%: of PSNH's total investment of $1.77 billion in Unit I). The Company also proposed that the PUC allow it a special emergency rate of return of 15.28% (the Company's cost of debt capital as determined by the PUC in the just concluded rate case).

Along with the request for an "emergency" rate increase, PSNH asked the PUC to certify two questions to the New Hampshire Supreme Court under N.H. Rev. Stat. Ann. 365:20 (1984).[32] Without notice or an opportunity to be heard, or any

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[30] *Appeal of PSNH*, N.H. Supreme Court, Docket No. 87-334 (appeal docketed Aug. 31, 1987). Date of Oral Argument has not been set.

[31] *See* N.H. Rev. Stat. Ann. 541:6 (1974).

[32] N.H. Rev. Stat. Ann. 365:20 (1984) provides: "The Commission may at any time reserve, certify and transfer to the supreme court for decision any question of law arising during the hearing of any matter before the commission."

semblance of due process,[33] the PUC transferred the questions to the New Hampshire Supreme Court. Along with the questions, the PUC forwarded certain "facts" contained in affidavits authored by PSNH Officers, and certain Seabrook prudency reports that were sponsored by outside consultants and which the OCA and others had not had an opportunity to cross-examine.[34] Clearly, PSNH hoped to effect the Court's opinion by this material and do so without any interference by the requirements of due process. The factual allegations contained in the interlocutory transfer were not the result of a contested hearing but merely packaged by PSNH and dutifully shipped off to the New Hampshire Supreme Court by the PUC. The OCA's first opportunity to be heard on the "emergency" rate case was at a prehearing conference held by the New Hampshire Supreme Court's Clerk.[35] As a result of that conference, the Court remanded the case to the Commission for findings of facts on issues *it* desired, deferring the issue of whether to," accept the proposed transfer until at a minimum, those issues were addressed.[36]

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[33] *See* N.H. Rev. Stat. Ann. 541-A:14-20 (Supp. 1987). The "essential" minimum standards. *Appeal of Kelleher*, 124 N.H. 274, 279, 469 A.2d 1322, 1325 (1983).

[34] Indeed the OCA had never even seen the Challenge Consultants prudency report. *See Jurisdictional Statement*, Appendix C at 37a-38a, for complete list of reports.

[35] *See Petition of PSNH*, slip opinion at 3. The OCA filed Motions requesting that the Court Refuse the Transfer and for Summary Disposition (N.H. Sup. Ct. R. 25) alleging due process violations in the manner of transfer. U.S. CONST. amend. V and XIV; N.H. CONST., pt.I, art.15. In compliance with the Court's Order Accepting Additional Transfer, Nov. 17, 1987. (*See Jurisdictional Statement*, Appendix I at 77a), the OCA repeated these procedural due process objections in its brief, but they were not addressed by the Court in its final decision.

[36] *See Petition of PSNH*, Order of the Supreme Court Deferring Transfer, September 2, 1987, (*See Jurisdictional Statement*, Appendix D at 43a).

Despite the Court's past refusal to act as PSNH's "super law firm",[37] the Court accepted the transfer from the PUC because it deemed the matter of vital importance to the State. It was clear to all that the Company was preparing to file bankruptcy.

Unfortunately, the PUC has a history of hasty and erratic if not colorable actions where PSNH is concerned.[38] In fact, despite the PUC's certification of these questions to the Court, the PUC then, almost beyond belief, did not wait for the Court to issue an opinion as to whether PSNH was entitled to a hearing, but proceeded to the merits of PSNH's "emergency" rate request anyway. When the PUC was challenged about going forward with a hearing that it had just asked the Court to decide whether it could hold, the PUC explained it could increase rates for PSNH with the use of "non-traditional" ratemaking methods, regardless of what the Court's opinion might be on the Questions originally transferred. Later, recognizing how utterly inconsistent this position was, the PUC finished the hearings, and then asked the Court a third question, i.e. whether it had authority to give PSNH the "non-traditional" relief it had already decided it could give, and had just concluded hearings on.

The Court answered all transferred questions in the negative, and PSNH got what it wanted, an opinion concerning the constitutionality of the laws of the State of New Hampshire. Having treated the New Hampshire Supreme Court as a "super law firm", the Company views this Court no differently, and requests a legal opinion on the value of the "debtor."[39]

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[37] *See Petition of PSNH*, 125 N.H. 595, 598, 484 A.2d 1139, 1141 (1984).

[38] *See Appeal of PSNH*, 122 N.H. 1062, 1074, 454 A.2d 435, 442 (1982); *Appeal of SAPL*, 125 N.H. 465, 482 A.2d 509 (1984).

[39] *See Jurisdictional Statement* at 17, note 15.

ARGUMENT

I. The Appellant's Constitutional Challenges Do Not Present A Substantial Federal Question

A. Appellant Seeks The Judicial Imposition Of A Specific Ratemaking Formula Upon The State Of New Hampshire Contrary To The Decision Of This Court In *FPC v. Hope Natural Gas Co.*

PSNH does not seek to have the Court reaffirm *FPC v. Hope Gas Co.*, 320 U.S. 591 (1944)(*Hope*), but to overturn it and impose on the State of New Hampshire a ratemaking formula more to its liking, i.e. one which guarantees corporate solvency. That policy is to have no policy. It demands the granting of unbridled discretion to the PUC, and denial of power to the Legislature to establish policies and enact statutes prescribing methods to be used in the setting of rates for public utilities. *See Jurisdictional Statement* at 18.

The New Hampshire Court found the anti-CWIP law was completely consistent with *Hope*. While the New Hampshire legislature intentionally left investors with their usual burden to accept the risk of a non-producing plant, the Court found a balancing of interests allowed investors a return commensurate with that risk, as well as a "vested right" to complete projects once started.

PSNH faults the New Hampshire Court's decision on two points that require response. *Jurisdictional Statement* at 19. PSNH obscures the fact that its duty to serve all is precisely what one bargains for in obtaining monopoly status. It is not the onerous duty implied. Secondly, PSNH, in criticizing the New Hampshire Supreme Court, ignores the reality that fi-

nancing for other utilities both now and during the last four years appears to be no problem in New Hampshire.[40]

PSNH refuses to recognize that its financial integrity has also been properly balanced against ratepayers interests by past New Hampshire Supreme Court decisions which find no limits on the amount of financing PSNH can raise regardless of the impact on rates. *Appeal of Conservation Law Foundation (CLF)*, 127 N.H. 606, 507 A.2d 652 (1986). Thus one side of the balancing equation allows PSNH unlimited access to ratepayer revenues, tempered only by what the traffic will bear, *if* Seabrook ever operates. The other side of the equation to this ratepayer exposure is investor exposure, which must likewise be without limit if the plant does not operate.

We have clearly balanced interests in New Hampshire, it is merely the results to which PSNH objects. But if this Court decides to review the matter and determine whether the New Hampshire scheme provides appropriate balancing, the Court should first consider whether it will similarly provide ratepayers a solution to the other side of the "financial integrity" question if it disagrees with the New Hampshire Court. Surely if this Court can determine to what extent a utility's "financial integrity" demands that a plant which may never produce be put into rates, then the Court should reveal how much can be put into rates without the rates becoming "extortionate" pursuant to *Hope*.

PSNH complains it cannot "be compensated for the construction investment" in Seabrook by a return on rate base

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[40] Since the New Hampshire Supreme Court's decision in this matter, other utilities have requested authorization to issue securities. By Order No. 19,060 (April 12, 1988) *Re: Chichester Tel. Co., 73 N.H.P.U.C. (1988), the PUC approved the purchase of Chichester Telephone by Data Systems, Inc. Large infusions of construction capital will be required to bring this sub par system up to a reasonable quality of service. By Order No. 19,062 (April 14, 1988), Re: Dunbarton Tel. Co., 73 N.H.P.U.C. (1988) the PUC* authorized Dunbarton Telephone Company to borrow $630,000 from the Rural Electrification Administration at 7.5% for 35 years. There are numerous other financing requests prior to the Supreme Court's order in this case.

only, when that rate base is but a fraction of the size of its total investment. *Jurisdictional Statement* at 22-23. PSNH at this point purposely confuses the concept of a return on its investments with the concept of compensation for risk. It is true PSNH cannot recover its total capital investment, or earnings thereon, when rate base is significantly smaller, by just enhancing the level of return for additional risk. But at the same time, increasing the rate of return on equity sufficiently to recognize the construction program risk actually perceived by investors is all that is required. An enhanced rate of return is only "meaningless" as PSNH claims, if its expected to recoup failed investments, not reward investors for the risks they assume. The rate of return allowed on PSNH's equity investment has always been appropriate to the risk perceived by its investors. PSNH has never argued otherwise until now.

PSNH argues that the Federal Constitution, and in particular *Hope*, in the name of balancing, gives the PUC more authority over rates than the body from which its power originates. "The prescribing of rates is a legislative act," *Bluefield W.W. & Improv. Co. v. Public Ser. Comm.*, 262 U.S. 679, 683 (1923); N.H. CONST. pt. II, art. 83; *Appeal of Pennichuck Water Works*, 120 N.H. 562, 565, 419 A.2d.1080, 1083 (1980), not an administrative act.

"*Hope*, ... is apposite to the question before us, not for what it holds that the constitution promises, but rather for what it explains that the constitution declines to guarantee." *Petition of PSNH*, slip opinion at 8. "... [R]egulation does not insure that the business shall produce net revenues...." *FPC v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 590 (1942). The Federal Constitution is only concerned with the end result of the rate order. *Petition of PSNH*, slip opinion at 8. But the tariff itself in a vacuum tells us nothing. "[T]he focus of inquiry is properly upon the end result or 'total effect' of the rate order, rather than upon the rate-setting method employed." *Pennsylvania Elec. v. Pennsylvania Pub. Util. Comm'n*, 502 A.2d 130, 133 (Pa. 1985), *appeal dismissed sub. nom., Metropolitan Edison*

Co. v. Pennsylvania Pub. Util. Comm'n, 106 S. Ct. 2239 (1986). *See Hope*, 320 U.S. at 602.

Therefore, how can this Court consistent with the dictates of *Hope* focus its attention properly upon the end result or total effect of the rate order when PSNH claims the Court does not even have a rate order before it. *See Jurisdictional Statement* at 4, note 2. The Commission controls three variables not one in setting rates: operating expenses, rate base and rate or percentage of return allowed on rate base. *Appeal of PSNH*, 125 N.H. at 49, 480 A.2d at 22. Only in the process where *all three* variables are addressed in the setting of rates can the issues be addressed that will allow the Court to determine whether the end result or total effect of that rate order comports with *Hope*. Without the *three variables* is there any case or controversy to decide?

Alternatively, if this Court decides the New Hampshire Supreme Court's decision below was in fact based on a record which examined *all three* variables, and the record will indeed support this conclusion, then this Court can take the case below because then its opinion will not be advisory.[41] *Petition of PSNH*, slip opinion at 5.

The fixing of prices in intrastate commerce is the exercise of the State's police power. *Munn v. Illinois*, 94 U.S. 113 (1876).

> "The fixing of prices, like other applications of the police power, may reduce the value of the property which is being regulated. But the fact value is reduced does not mean that the regulation is invalid." *Hope*, 320 U.S. at 601.

The Federal Constitution does not bind the States to the service of any single formula or a combination of formulas, *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586; *FPC v. Hope Natural Gas Co.*, 320 U.S. at 600; *Permian Basin Area*

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[41] Contrary to PSNH's claim investors were not compensated for the risks assumed, (*See Jurisdictional Statement* at 22), a PUC staff expert testified investors were rewarded for the risk of a nuclear unit. PSNH neither objected to this testimony or rebutted it.

Rate Cases, 390 U.S. 747, 800 (1968), in the setting of rates. The New Hampshire State Constitution does. It sets down principles and guidelines important to the Legislature and the Supreme Court in designing and interpreting a regulatory scheme which protects the property rights of both the investor and consumer. Part II, Article 83 of The State Constitution "... declares our fundamental preference for free enterprise." *Appeal of Omni Communications, Inc.*, 122 N.H. 860, 862, 451 A.2d 1289, 1290 (1982). The Legislature has enacted a statutory scheme of regulation to "...'find a remedy against the evils of monopoly', thus restoring 'healthy competition in the trades and industries.'" *Appeal of Omni Communications, Inc.*, 122 N.H. at 862, 451 A.2d at 1290; JOURN. OF CONST. CONVENTION OF 1902, 579 (1903). "The role and duty of ... [the] commission is to oversee and regulate those few necessary monopolies so that the constitutional rights of free trade and private enterprise are disrupted as little as possible." *Appeal of Omni Communications, Inc.*, 122 N.H. at 862-863, 451 A.2d at 1291. "The statutes which govern the regulation of utilities and which grant the [PUC] its authority provide a surrogate for competition." *Northern Indiana Pub. Serv. Co. v. Citizen's Action Coalition* 485 N.E. 2d 610, 614 (Ind. 1985), *appeal dismissed*, 106 S. Ct. 2239 (1986).

"The majority opinion in the 1944 *Hope Natural Gas Co.* case essentially adopted the theory of legislative hegemony in the sphere of economic regulation expressed in the *Natural Gas Pipeline Co.* concurrence." *Dayton Power & Light Co. v. Public Utilities*, 447 N.E. 2d 733, 740 (Ohio 1983); *In accord, Cleveland Elect. Illum. Co. v. Pub. Util. Comm'n.*,N 447 N.E. 2d 746 (Ohio 1983), *appeal dismissed*, 464 U.S. 802 (1983). The Court does "... not sit as board of revision, but to enforce constitution rights." *Los Angeles Gas Co. v. R.R. Comm'n* 289 U.S. 287, 304 (1932). "The legislature discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislature determination as well as the determination itself. *Id.* at

304. "For protection against [alleged] abuses by legislatures the people must resort to the polls, not to the courts." *Munn v. Illinois*, 94 U.S. 113, 134 (1876). "In the broad sweep of utility regulation and financing, fundamental changes in risk allocation are policy matters for the legislature rather than constitutional matter for the courts." *Petition of PSNH*, slip opinion at 17.

Hope held that the used and useful principle is no longer constitutionally mandated, but it remains a constitutionally permissible legislative articulation of the perceived interests of consumers. *See Pet. of PSNH*, at 12.

> "The 'used and useful' concept came into existence long before the *Hope* decision was rendered, and it is not generally regarded as having been overridden by that decision." *Pennsylvania Elec. v. Pennsylvania Pub. Util.*, 502 A.2d at 135, *appeal dismissed sub nom., Metropolitan Edison Co. v. Pennsylvania Pub. Util. Comm'n.*, 106 S.Ct. 2239 (1986).

It would indeed be curious if the Federal Constitution now prohibits legislative use of ratemaking principles once constitutionally required.

B. The Postponement of Profit Until A State Of Present Use Is Not An Act Of Confiscation But The Exercise Of Legitimate Legislative Discretion

The protection guaranteed by the Federal Constitution relates only to property used and useful in public service. *Denver Stockyard Co. v. U.S.*, 304 U.S. 470, 475 (1937). "Postponement of ... profit until the stage of ... present use is not an act of confiscation, but a legitimate exercise of legislative judgment." *Columbus Gas v. Comm'n.*, 292 U.S. 398, 407 (1934). "The anti-CWIP law, ... protects consumers against the direct consequences of a failed investment and places the onus on the financial markets to assess carefully investment decisions." *Petition of PSNH*, slip opinion at 12.

> "It would be inequitable to prematurely shift the risk of plant failure from the utility's investors to the ratepayers by the inclusion in the rate base of highly

> complex and innovative technology which has not been proven to be reasonably free from significant design or construction defects. The initial risk of failure is appropriately borne by the investors, who have undertaken the project and who will ultimately profit from its success." *Consumers' Council v. Public Util. Comm.*, 391 N.E. 2d 311, 315 (Ohio 1979).

The New Hampshire Supreme Court has rejected the judicial bailout advocated by PSNH.

> "The essence of the company's position in this interlocutory transfer is not ... the company's desire for the setting of a just and reasonable rate to compensate investors for the risks they have assumed. PSNH seeks rather nothing less than allocation of the risk back to the ratepayers now that the risk of inoperative investment has materialized." *Petition of PSNH*, slip opinion at 10.

The Court, to its credit, has instead followed the traditional free enterprise principles of our founding fathers which requires payment for services rendered rather than services promised.

The Company has more "sticks" in its "bundle of property rights" than any utility operating in any other state. The State of New Hampshire is much more limited in its actions with respect to this Company's property under the State Constitution, then it is under the Federal Constitution. The Company has certain "vested rights" under the New Hampshire Constitution, rights which do not exist under the Federal Constitution. *See Appeal of PSNH*, 122 N.H. 1062, 454 A.2d 435 (1982). The New Hampshire Constitution creates more rights. *See State v. Ball*, 124 N.H. 226, 231-232, 471 A.2d 347, 350 (1983). In the area of public utility regulation, the State Constitution prohibits the PUC from telling a utility how to manage its affairs. Although the State imposes upon PSNH the obligation to serve (N.H. Rev. Stat. Ann. 374:1) in exchange for its monopoly status, (*See Jersey Cent. Power & Light Co. v. FERC*, 810 F. 2d 1168, 1190 (D.C. Cir. 1987), Starr, J., concur-

ring), the PUC does not have the authority to tell PSNH precisely how it is to fulfill this obligation and may only review the prudency of its actions when recovery from ratepayers is sought. "Furthermore, a public utility is not bound to supply consumer energy needs beyond its financial capacity to do so." *Appeal of Legislative Utility Consumers Council (LUCC)*, 120 N.H. 173, 175, 412 A.2d 738, 739 (1980).

In 1982 the PUC, convinced that PSNH was headed for financial failure, attached conditions to a PSNH financing. The PUC, in effect, ordered the Company not to expend funds on Seabrook Unit II until it divested itself of part of its ownership interest in the Seabrook project so that it owned no more than 28%, got the other Joint Owners to help alleviate its financial condition or Seabrook Unit I was completed. *Appeal of PSNH* 122 N.H. at 1065, 454 A.2d at 436-437. PSNH appealed and maintained, in effect, "... not only that it has the right to complete the project with its own funds, but also that it has the right to issue any securities that it believes are necessary to finance the project." *Appeal of PSNH*, 122 N.H. at 1078, 454 A.2d at 444-445, (King, C.J., dissenting). The majority agreed.

The New Hampshire Supreme Court held "[b]e it one unit or two, our constitution is explicit that 'no part of a man's property shall be taken from him' without due process and compensation" N.H. CONST. pt. I, art. 12; *Appeal of PSNH*, 122 N.H. at 1070, 454 A.2d at 440. After the State approved PSNH's initial proposal for the Seabrook project,[12] it acquired a "vested right" to complete the project, regardless of the PUC's belief that changing conditions dictated a change in course. *Id.* 122 N.H. at 1069-1070, 454 A.2d at 439. "The unfortunate effect of judicial intervention in this field is to divert the attention of those engaged in the process from what is

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[12] *See Society For Protection of N.H. Forests v. Site Evaluation Committee*, 115 N.H. 163, 337 A.2d 778 (1975); N.H. Rev. Stat. Ann. chapter 162-F (1977); *Appeal of PSNH*, 122 N.H. at 1067-1069, 454 A.2d at 438-439.

economically wise to what is legally permissible." *Hope*, 320 U.S. at 652, (Jackson, J., concurring).

Nonetheless, "[a] vested right to build is not a vested right to have customers pay," now that the risk of an inoperative plant has materialized. *Appeal of PSNH*, 122 N.H. at 1076, 454 A.2d at 443.

New Hampshire has decided not to abandon the principle of used and useful in the nuclear age, especially when its utilities have certain "vested rights" and Federal licensing procedures do not guarantee that a nuclear plant that is built will ever enter commercial operation. Investors are now, and have been for decades, on notice that all their funds may go for naught. *Power Reactor Co. v. Electricians.*, 367 U.S. 396, 415 (1961). In view of the Federal licensing scheme, the New Hampshire legislature has wisely decided that this risk of loss is upon investors until the necessary licenses are obtained and the plant is providing service to customers. N.H. Rev. Stat. Ann. 378:30-a (1984). PSNH, "[w]ith its eyes open, ... has willingly accepted that risk, however great." *Power Reactor Co. v. Electricians.*, 367 U.S. at 415.

II. The Arguments Raised In This Case Are Wholly Without Merit

A. Appellant Is Not Entitled To Return Based On What Risks Are Now

"[N]uclear power, the national pride and goal of the early 1970's," (*Jurisdictional Statement* at 16), has now proven to be the boondoggle of the 1980's. Seabrook power, once heralded as "Too Cheap To Meter", is going to be too expensive to bill if and when PSNH ever gets Seabrook into commercial operation. The promise of the 1970's is a costly lesson in the ageless adage that one should never put all of one's eggs in a single basket.

This is not a situation in which we are dealing with prudently abandoned plant.[43]

> "At a time when other utility companies determined ... that market forces required them to abandon future construction of nuclear generating plants already under construction, PSNH in the face of an unchallenged anti-CWIP statute determined to proceed with construction. The risk of doing so was measured and calculated closely by the marketplace and investors and was reflected in the interest rates charged on the company's bonds and notes and the market prices of its equity shares. The risk of failure was present in this enterprise as with any other business venture and was available for assessment by those who lent money and those who bought shares." *Petition of PSNH*, slip opinion at 11-12.

PSNH's statement "... that no investor, with foreknowledge of what some state courts now say is the extent of their rights, would ever risk capital in an anti-CWIP state," flies in the face of reality. *See Jurisdictional Statement* at 19. New Hampshire's used and useful policy did not first appear with the enactment of the anti-CWIP statute. *See New England Tel. Co. v. State*, 95 N.H. 353, 366, 64 A.2d 9, 19 (1949).

Investors have been more than willing to gamble if the return is high enough. Step Three in the 1984 Newbrook plan, the "... sale of $525 million in Third Mortgage deferred interest bonds and pollution control revenue bonds involves a two-year capitalization of interest at a 23% rate." *Appeal of CLF*,

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[43] PSNH's contention that its situation is like that of the *Duquesne* case, (*See Duquesne Light Co. v. Barasch*, Docket No. 87-1160) in which the Court noted probable jurisdiction, is spurious. The Appellants in that case allege that the Pennsylvania Supreme Court did not recognize any obligation to balance consumer and investor interests and did not even mention *Hope*. The New Hampshire Supreme Court relies on and extensively cites *Hope*. It specifically addresses the issue of balancing and finds that the New Hampshire regulatory scheme balances the interests in accordance with *Hope*. *See Petition of PSNH*, slip opinion at 8-12.

127 N.H. 650, 507 A.2dL at 682, (King C.J., dissenting). The Company has never been short of speculators willing to invest in it, despite its failure to have investment grade securities since 1979.[11]

> "Any vested right which the company had when it commenced construction was a right to the constitutional guarantees of *Hope;* namely, "just and reasonable rates" based in part upon property used and useful in the generation of electricity. This right exists today. It has not been taken away by the anti-CWIP law. Neither the company nor its investors had a vested right to the economic status quo at the time of the investment decision. Such matters as increasing costs, inflation, high interest rates, conservation, the OPEC cartel, and the myriad of other factors affecting business judgment are the concerns of the free market and its forces which ultimately fall upon management to assess. Not all management decisions are reviewable or subject to cure in the judiciary." *Petition of PSNH,* slip opinion at 13.

PSNH claims the New Hampshire Court's finding that it has been given an adequate return is pure dictum, basing its argument on the allegation the Court miscited a 1980 PUC Order. *Jurisdictional Statement* at 20-22. Therefore, in PSNH's view the PUC never allowed it "any return" on construction investment. In truth the PUC has found without any equivocation that PSNH's revenues include a partial recovery of its construction capital costs. In fact the matter is addressed at some length by the PUC when it notes the effect on rate of return using total Company capital, stating the Seabrook project

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[11] The Company lost its "B" bond rating in 1979. Securities rated at B or below lack the characteristics of a desirable investment.

> "... has a direct effect upon rates through the recovery of capital costs in the rate of return component of the rate formula." *Re: PSNH, 69* N.H.P.U.C. 67, 84 (1984).

What PSNH construes as a miscitation is actually recognition by the Court that in the very first case after the anti-CWIP law, the PUC intentionally used "the costs rates of all equity and debt issues" including Seabrook in calculating an overall rate of return, thereby increasing the profit otherwise allowed. *Re: PSNH*, 65 N.H.P.U.C. 45, 53 (1980), *See Jurisdictional Statement*, Appendix J at 92a. Nor can there be any question the New Hampshire Court understands the impact on revenues which results from using total capital versus capital represented by rate base alone. *Appeal of PSNH*, 125 N.H. 46 (1984).

Nonetheless, the New Hampshire Supreme Court's first interpretation of the anti-CWIP statute does not address the proper return on equity. The concern in that opinion[45] was "... only with the basic analysis necessary for an understanding of how the statute, [N.H. Rev. Stat. Ann. 378:30-a], operates." *Appeal of PSNH*, 125 N.H. at 49, 480 A.2d at 22.

> "We cannot determine on the present record however, the extent, if any, to which the lost investment may justify an increase in the rate of return for the purpose of attracting new capital. It is easy to argue that any increase in the rate of return will allow at least partial recovery of lost investment. But it does not follow from this alone that the statute precludes such a result if it is necessary to attract such investment as the commission may find to be required in the future. We will not attempt in the abstract to draw the line between an increase in rate of return that produces an indirect and impermissible recovery on the one hand and one that is arguably neces-

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[45] This case involved the transfer of questions by the PUC to the Court pursuant to N.H. Rev. Stat. Ann. 365:20 (1984) as well.

sary to attract investment essential to future operations on the other." *Id.*, 125 N.H. at 55, 480 A.2d at 26.

B. The Return To Which PSNH Is Entitled

PSNH is not entitled to have its rate of return increased to the point where it is "... producing the same revenue over the same period of time that might be produced if the investment were amortized as an expense." *Appeal of PSNH*, 125 N.H. at 55, 480 A.2d at 26. Nor does it have a "... constitutional right to profits as are realized or anticipated in highly profitable enterprises or speculative ventures." *Bluefield W.W. Improv. Co. v. PSC*, 262 U.S. at 692-693. It is entitled to a return "... commensurate with returns on investments in other enterprises having corresponding risks ... moreover, [the return] should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital." *Hope*, 320 U.S. at 603.

PSNH is entitled to "... *not less* than a *reasonable return* on the cost of the property of the utility *used* and *useful* in public service." N.H. Rev. Stat. Ann. 378:27. (emphasis added).

"... [T]he *return must equal the cost of capital* represented by the rate base, that is, by the value of the Company's *used and useful property.*" *Appeal of Cheshire Bridge Corp.*, 126 N.H. 425, 431, 493 A.2d 1151, 1156 (1985). (emphasis supplied) "Once determined, it marks the *minimum* rate of return to which the company is lawfully entitled." *New England Tel. Co. v. State*, 95 N.H. 353, 361, 64 A.2d 9, 16 (1949); *New England Tel. Co. v. State*, 104 N.H. 229, 232, 183 A.2d 237, 240 (1962). (emphasis supplied) "However, in accordance with the statutory directive that rates be 'just and reasonable' (N.H. Rev. Stat. Ann. 378:7, :27,28), the Commission in the exercise of its judgement on the evidence before it can allow a rate of return in excess of the cost of capital." *New Eng. Tel. Co. v. State*, 104 N.H. at 232, 183 A.2d at 240; *Appeal of Cheshire Bridge Corp.*, 126 N.H. at 425, 493 A.2d at 1157. The New Hampshire Court recognizes the PUC has done so. *Petition of PSNH*, slip opinion at 9.

"[T]he rate of return to which the investor is entitled is measured in part by the risks of the business as compared with those of comparable enterprises." *Washington Gas Light Co. v. Baker*, 188 F.2d 11, 19 (D.C. Cir. 1950), cert. denied, 340 U.S. 952 (1951). The constitutional consequence of N.H. Rev. Stat. Ann. 378:30-a (1984) "... is that those who bear the risk must be compensated by a return on their investment that reflects the risk that the statute places upon them." *Petition of PSNH*, slip opinion at 9. The New Hampshire Supreme Court has found that in the past, the PUC has applied the proper analysis to the Company's rate of return to reflect the additional risks created by the anti-CWIP statute. *Id.* at 9. Apparently PSNH agreed because it never appealed from the prior PUC decisions they now refer to. The issue of whether the Company has received compensation for this risk in its *current rates* is also before the New Hampshire Supreme Court. *Appeal of PSNH*, New Hampshire Supreme Court Docket No. 87-334, (appeal docketed August 31, 1987).

If the New Hampshire Supreme Court decides that PSNH has received the return it is entitled to, "... then the investor would be paid for the occurrence of the very eventuality the risk of which he had been consciously carrying and for which he had already been paid." *Washington Gas Light Co. v. Baker*, 188 F.2d at 20.

To, after paying investors for the risk that assets may never produce, place those non-producing assets in rate base as well, has the same effect upon the consumer "... as if an insured person were required to assume the loss against which he believed himself protected by the payment of premiums." *Id.* at 20. The end result of this rate order would clearly violate the consumer interest against "exorbitant" rates. *Id.* at 20. "With or without anti-CWIP the State and Federal Constitution do not allow the Company to have it both ways." *Petition of PSNH*, slip opinion at 10. "Ratepayers cannot be required both to carry this risk and to pay the Company for carrying it." *Washington Gas Light Co. v. Baker*, 188 F.2d at 20.

The end result of New Hampshire's regulatory scheme is similar to that of Ohio. This Court has approved this manner of compensation. *See Cleveland Elec. v. Public Util. Comm.*, 447 N.E. 2d 746 (Ohio 1983), *appeal dismissed*, 464 U.S. 802 (1983); *Dayton Power & Light Co. v. Pub. Util. Comm'n.*, 447 N.E. 2d 733 (Ohio 1983); *Consumer's Counsel v. Pub. Util. Comm'n. of Ohio*, 447 N.E. 2d 749 (Ohio 1983); *See also Toledo Edison Co. v. Pub. Util. Comm'n.* 447 N.E. 886 (Ohio 1984); *See* also generally, Drobak, *From Turnpike to Nuclear Power: The Constitutional Limits on Utility Rate Regulation*, 65 B.U.L. Rev. 65 (1985).

The fact that some may allow more is irrelevant. "Regulation may, consistently with the Constitution, limit stringently the return recovered on investment, for investors' interests provide only one of the variables in the constitutional calculus of reasonableness." *Permian Basin Area Rate Cases*, 390 U.S. 747, 769 (1968).

III. Appellant Has Not Timely Or Properly Raised The Federal Issues

PSNH has had since 1979 to challenge the anti-CWIP statute. It has had numerous rate cases in which to do so. A decision in the Company's favor will not change the situation in which it finds itself.

Hope's investor interests are "... inapplicable to a company whose financial integrity already is hopelessly undermined, which could not attract capital on any possible rate, and where investors recognize as lost a part of what they have put in." *Market Street R. Co. v. Comm'n*, 324 U.S. 548, 566 (1945).

> "The due process clause has been applied to prevent governmental destruction of existing economic values. It has not and cannot be applied to insure values or to restore values that have been lost by the operation of economic forces. *Id.* at 567.

"Providing a return sufficient to maintain the financial integrity of a sound company is one thing; restoring the financial integrity is another." *Petition of PSNH*, slip opinion at 10.

CONCLUSION

PSNH's "lack of financial integrity" does not flow from policies enacted in Concord, New Hampshire but from those enacted in Washington, D.C. Federal nuclear policy not State ratemaking formulas are to blame. It was not PSNH's residential utility consumers who picked Seabrook as the site of this Company's first foray into the field of nuclear energy. There is no legal justification for requiring consumers to bailout a utility that has arguably placed a multibillion dollar nuclear generator in the wrong place and which has been generously paid for risks that were freely accepted. PSNH has already had its *Hope* hearing on its present rates, which is now on appeal to the New Hampshire Supreme Court. The "emergency" case was a second *Hope* hearing on these same rates. This appeal presents no substantial federal question that has not been fully answered many times in the past by this Court.

Respectfully submitted,

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Dated: May 13, 1988

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NO. 87-1613

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE,
Appellant

v.

THE STATE OF NEW HAMPSHIRE,
Appellee

On Appeal From The Supreme Court
Of New Hampshire

CERTIFICATE OF SERVICE

I, Michael W. Holmes, a member of the Bar of this Court, hereby certify that on the 13th day of May, 1988, three copies of the Motion of Appellee, Michael W. Holmes, Consumer Advocate, To Dismiss or Affirm, in the above entitled case were mailed, first class postage prepaid, to Thomas R. Jones, Esq., Attorney for Appellant, 80 Pine Street, New York, New York, 10005, Larry M. Smuckler, Esq., Assistant Attorney General, Attorney for the State of New Hampshire, State House Annex, 25 Capitol Street, Concord, New Hampshire, 03301, Robert C. Hinkley, Esq., Attorney for Campaign for Ratepayer's Rights, 1838 Elm Street, Manchester, New Hampshire, 03104.

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